

NO. 21737

In the  
UNITED STATES COURT OF APPEALS  
For the Ninth Circuit

HONOLULU LUMBER CO., LTD.,  
Appellant,

vs.

AMERICAN FACTORS, LTD., CITY MILL  
CO., LTD., HAWAII BUILDERS SUPPLY  
CO., LTD., ISLAND LUMBER CO., LTD.,  
LEWERS & COOKE, LTD., MID PAC  
LUMBER CO., LTD., et al.,  
Appellees.

Appellant's Petition for a Rehearing  
and Request for a Hearing in Banc

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**FILED**

MAY 17 1968

WM. B. LUCK, CLERK



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#### INTRODUCTION AND REFERENCES

Appellant is in receipt of the proposed Order of the Court in this cause and respectfully petitions for a rehearing and for a hearing in banc upon the rehearing herein sought. References herein are to Appellant's Opening Brief (AOB), Appellees' Answering Brief (AAB), and Appellant's Reply Brief (ARB).

I

THE ORDER OF THIS COURT DOES NOT FOLLOW THE FEDERAL RULES OF CIVIL PROCEDURE, RULES 6 and 7.

In affirming the judgment of the court below, this Court of





necessity approved the withdrawal of plaintiff's local counsel of record on June 24, 1966 upon an ex parte application unsupported by affidavit in violation of Rules 6 and 7 of the Federal Rules of Civil Procedure. As set forth in Appellant's Opening Brief (AOB 15-16) the proper procedure is to file a substitution of attorneys consented to by both the old and new attorneys and by the client; but if the consent of the client is not obtainable, by a court order upon a written application or motion therefor with notice to the client and for good cause shown supported by affidavit citing Laskowitz vs. Shellenberger (S.D. Calif. 1952), 107 F.Supp 397.

If the withdrawal of appellant's local attorneys of record was the primary cause of this appellant's failure to have its president attend a noticed deposition on June 28, 1966 or thereafter and to appear by counsel at the hearing on Appellees' Motion to Dismiss on September 2, 1966 and subsequent hearings (ARB 7-9) then such failure would be excused since under Rule 1e of the District Court's local Rules appellant was prohibited from prosecuting its action without securing new local counsel. Any appearance by its mainland counsel alone without such local counsel would have been prohibited by this rule, and consequently, an appearance by mainland counsel at the various hearings commencing September 2, 1966 would have been an exercise in futility on such counsel's part.

By affirming the judgment below this Court is in effect





holding that an attorney of record in a civil action in the federal courts may be relieved of his responsibility to his client by the simple expedient of obtaining an ex parte Order of Withdrawal unsupported by affidavit and without notice to his client or to other parties to the action. Appellant respectfully suggests that this is a consequence unintended by this Court.

## II

THE ORDER OF THIS COURT DOES NOT FOLLOW ITS RULE 17(6)

Rule 17, subsection 6 of this Court requires that it consider nothing on appeal but those parts of the record as designated by the parties. Appellant designated certain portions; Appellees did not. Appellees then referred to portions of the undesignated record in their Reply Brief (AAB 2), and Appellant moved to strike, which motion was denied.

In denying said appellant's Motion to Strike, this Court in effect considered undesignated portions of the record in deciding this appeal, in violation of its own Rule 17(6). Appellant respectfully suggests that this is a further consequence unintended by this Court.

## III

THE DISTRICT COURT'S DISMISSAL OF THIS ACTION WAS AN ABUSE OF DISCRETION

Appellant has attempted to show in its Opening Brief and Reply Brief that its apparent failure to prosecute this antitrust action in the last two months of almost five years of litigation when it



was prepared to go to trial and had in fact filed a Pre-Trial Memorandum, was due to the improper action of the District Court in permitting the withdrawal of its local counsel without just cause and without complying with the Federal Rules of Civil Procedure, Rules 6 and 7.

In addition to the cases cited therein, Appellant respectfully refers this Court to the case of

Meeker v. Rizley, CA 10 1963, 324 F.2d 269

where a dismissal for failure to appear at a pretrial hearing was reversed, the Court stating:


"The law favors the disposition of litigation on its merits. . . Dismissal is a harsh sanction and should be resorted to only in extreme cases."

#### CONCLUSION

Because of the seriousness of the foregoing consequences on the orderly administration of justice, Appellant respectfully requests this honorable Court that a rehearing be granted and for a hearing in banc upon the rehearing herein sought. If this request be denied, Appellant further requests that the Court file an Opinion setting forth its grounds for disregarding said Rules 6 and 7 of F.R.C.P. and Rule 17(6) of its own Rules.

Dated: San Francisco, California, May 17, 1968.

Respectfully submitted,

  
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Arthur H. Tibbits  
Attorney for Appellant and  
Petitioner





## CERTIFICATE OF COUNSEL

I hereby certify that I have read the foregoing Petition for Rehearing and Request for a Hearing in Banc and that said Petition and Request in my judgment are well founded and not interposed for the purpose of delay.

*Arthur H. Tibbits*  
*Arthur H. Tibbits*

Attorney for Appellant  
and Petitioner

## CERTIFICATE OF MAILING

ARTHUR H. TIBBITS, Esquire, certifies that he is an active member of the State Bar of California and that his business address is 55 New Montgomery Street, San Francisco, California 94105; that he has served a copy of the attached Appellant's Petition for a Rehearing and Request for a Hearing in Banc, of appellant HONOLULU LUMBER CO., LTD., by placing a copy in an envelope addressed to the following persons at their office addresses as below:

Gilbert E. Cox, Esq.  
First National Bank Building  
Honolulu, Hawaii

Hiroshi Sakai, Esq.  
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Honolulu, Hawaii

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Daniel H. Case, Esq.  
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George L. T. Kerr, Esq.  
First National Bank Building  
Honolulu, Hawaii

Leslie W. S. Lum, Esq.  
Room 257, Alexander Young Bldg.  
Honolulu, Hawaii

The envelopes were then sealed and postage fully prepaid and on May 17, 1968 were deposited in the United States Mail at San Francisco, California.

Executed on May 17, 1968 at San Francisco, California.

*Arthur A. Tibbits*  
*Arthur H. Tibbits*

Arthur H. Tibbits

